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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA- WESTERN DISTRICT**

MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.,  
and MERSCORP HOLDINGS, INC.,

Plaintiffs,

v.

DANIEL W. ROBINSON and DARLA  
J. ROBINSON,

Defendants.

CASE NO.: CV13-07142-PSG (ASx)

DEFENDANT DANIEL W. ROBINSON  
and DARLA J. ROBINSON'S NOTICE OF  
MOTION AND MOTION TO DISMISS  
THE COMPLAINT.

Date Filed: September 26, 2013  
Judge: Hon. Philip S. Gutierrez  
Courtroom: 880

Hearing Date: January 27, 2014  
Hearing Time: 1:30 p.m.

312 North Spring Street  
Los Angeles, Ca. 90012

PLEASE TAKE NOTICE that on January 27, 2013 at 1:30 p.m., in courtroom 880  
of the above entitled court located at 225 East Temple Street. Los Angeles California  
90012, the Honorable Philip S. Gutierrez presiding, Defendants Daniel W. Robinson and  
Darla J. Robinson (hereafter "Defendants") will move to dismiss the first through fourth

1 claims in the Complaint by MORTGAGE ELECTRONIC SYSTEMS, INC. and  
2 MERSCORP HOLDINGS, INC (hereafter “Plaintiffs” or “MERS,” pursuant to FRCP  
3 12(b)(6).  
4

5 Grounds for the 12(b)(6) Motion to Dismiss are as follows:

6 **1. First Claim:**

7  
8 Plaintiffs fail to state a claim for Setting Aside a Void Judgment because 1) the  
9 underlying QUIET TITLE cause of action required only the beneficiary and other parties  
10 at interest to be named as Defendants, 2) Plaintiffs are agents and therefore are not  
11 parties at interest, 3) as non-interested parties Plaintiffs cannot assert diversity  
12 jurisdiction, and 4) Plaintiffs are collaterally estopped from reversing a state court  
13 judgment in federal court.  
14  
15

16 **2. Second Claim:**

17  
18 Plaintiffs fail to state a claim for Violation of Due Process because 1) Plaintiffs  
19 are not the party at interest, 2) Plaintiffs have limited authority as agents of the  
20 beneficiary that does not allow them to initiate a cause of action, and 3) Plaintiffs have  
21 lost nothing and have not been injured.  
22

23 **3. Third Claim**

24  
25 Plaintiffs fail to state a claim for Cancellation of Void Instrument because 1) the  
26 Lis Pendens recorded by Defendants was properly served on all parties to Defendants’  
27 state court action, 2) the judgment recorded by Defendants on April 25, 2013 was not a  
28

1 void judgment, 3) Plaintiffs are not parties of interest with standing to bring this cause of  
2 action, and 4) Plaintiffs have not been harmed by Defendants' state court judgment.

3  
4 **4. Fourth Claim**

5 Plaintiffs fail to state a claim for Slander of Title because 1) Plaintiffs are not  
6 owners of the property in question, 2) Defendants recorded a valid state court judgment,  
7 and 3) Plaintiffs have not suffered any loss.  
8

9 This Motion to Dismiss is based upon this Notice, the Memorandum of Points and  
10 Authorities, the Complaint, and Defendants' arguments at the hearing.  
11  
12  
13  
14

15 Respectfully submitted,

16 Dated: December 5, 2013

ADVOCATE LEGAL

18 By: /s/ Susan M. Murphy.  
19 Susan M. Murphy  
20 Attorney for Plaintiffs  
21 DANIEL W. ROBINSON and  
22 DARLA J. ROBINSON  
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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Plaintiffs MORTGAGE ELECTRONIC SYSTEMS, INC. and parent company MERSCORP HOLDINGS, INC (“MERS”) claim (collectively) to be a real party in interest to Defendants' state court action for Quiet Title and Expungement of their Deed of Trust and claim violation of their Due Process rights so as to render Defendants’ state court judgment VOID. (Comp. ¶s 45-46, EX. 4.) Although Plaintiffs lose nothing by non-payment, which is the determinant of beneficial interest, Plaintiffs claim a beneficial interest because “MERS” and “Mortgage Electronic Systems, Inc.” are named as “Nominee” and “beneficiary” on Defendants’ Deed of Trust. (Comp. ¶ 29, EX.4.) Plaintiffs’ state of incorporation (Delaware) and main offices (Virginia) are their grounds for asserting diversity jurisdiction based on MERS’s corporate citizenship. (Comp. ¶s 4-5.)

MERS is a computerized registry created by sellers and servicers of residential mortgage backed securities (“RMBS”), including Bank of America, N.A. the servicer of Defendant’s loan from 2009 to 2013.<sup>1</sup> Securitization of mortgage loans into RMBS is the process by which mortgage loans are pooled and sold to investors by the originators

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<sup>1</sup> MERS website Available at: <http://www.mersinc.org/about-us/board-of-directors>.



1 that then retained the originated mortgage servicing rights (“OMSR”)<sup>2</sup>. Those on the  
 2 sell-side created MERS to make securitization easier and cheaper by avoiding recording  
 3 fees for the multiple transactions necessary for securitization with a scheme by which  
 4 MERS would remain the recorded beneficiary while these multiple transactions were  
 5 recorded only in the MERS database.<sup>3</sup> The MERS business model consists of charging  
 6 members a per-transaction fee for use of the MERS computer registry.<sup>4</sup>

9 Currently approximately seventy percent (70%) of mortgages and deeds of trusts are  
 10 securitized, but securitization is a relatively new phenomenon having first occurred in  
 11 the 1970’s.<sup>5</sup> The Federal National Mortgage Association (Fannie Mae) was a product of  
 12 the New Deal in 1938, but it did not engage in securitization until 1981 and  
 13 securitization grew steadily after that.<sup>6</sup> Before securitization mortgages were not  
 14 routinely assigned between beneficiaries and foreclosure was fairly rare.

17 The system of county-by-county recording of mortgages and Deeds of Trust that  
 18 MERS preempted was a working system that benefitted lien holders, sellers, and buyers  
 19

---

21 <sup>2</sup> Comptroller of the Currency Handbook, *Mortgage Banking*, Narrative March 1996, Procedures 1998, p.21 (“OMSR may  
 22 be acquired through the bank’s retail loan production activities.”)

23 <sup>3</sup> Christopher Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U.  
 24 Cin. L. Rev. 1361 (2010).

24 <sup>4</sup> *Id.*.

25 <sup>5</sup> Jonathan Tower, *Ginnie Mae Pool No. 1: A Revolution is Paid Off*, SEATTLE TIMES, Sept. 19, 1999 at F1 (noting that  
 26 the sale of the first mortgage backed security (MBS) was in February 1970) Available at:  
<http://community.seattletimes.nwsources.com/archive/?date=19990919&slug=2983955>;

27 <sup>6</sup> Adam J. Levitin & Susan M. Wachter, *The Public Option in Housing Finance*, 46 U.C. DAVIS L.REV. 1162 (discussing  
 28 the evolution of the secondary market) Available at: [http://lawreview.law.ucdavis.edu/issues/46/4/Articles/46-4\\_Levitin-Wachter.pdf](http://lawreview.law.ucdavis.edu/issues/46/4/Articles/46-4_Levitin-Wachter.pdf).

1 of real property through recorded notice. Although the county-by-county system was  
 2 intended to create a priority of liens, it also serves as a de facto title guarantee which  
 3 protects bona-fide purchasers from priority claims and guarantees security in property  
 4 sales. The MERS system is not equal to the county-by-county recording system because  
 5 it tracks servicing rights, not ownership or title. Once a loan is assigned to MERS, the  
 6 public land title records no longer reveal the beneficiary of a lien making it impossible to  
 7 track if transfers were made, how they were made, or to whom they were made, and  
 8 therefore chain of title.<sup>7</sup>

12 The core transaction required for securitization is actually a series of four (4)  
 13 transactions from the originator to the single purpose vehicle (“SPV”) which in the case  
 14 of RMBS is a Real Estate Mortgage Investment Conduit (“REMIC”).<sup>8</sup> All of these  
 15 transactions involve endorsement and physical transfer of the borrower’s Promissory  
 16 NOTE in order to be “true sales.”<sup>9</sup> Bankruptcy remoteness means that REMIC cannot  
 17 be affected by any participant’s bankruptcy, which adds to the profitability of the  
 18 investment and is only created if all these transfers are real and verifiable “true sales.”<sup>10</sup>

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23 <sup>7</sup> Peterson *supra* at p. 1371.

24 <sup>8</sup> Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, Duke Law Journal  
 25 Vol. 63 at 672 (2013).

26 <sup>9</sup> *Id.* at p.673 fn.144.

27 <sup>10</sup> *Id.* at p.673, fn. 144 (“Bankruptcy remoteness means 1) that the trust’s assets are not affected by the bankruptcy of the  
 28 depositor, seller, or originator because the transferred assets cannot be claimed as properties of their bankruptcy estates and  
 2) that the trust itself cannot file for bankruptcy.”)

1 Pass-through tax status, meaning that none of these four (4) transactions are taxed,  
2 and requires that the entire sale take place within a limited time period usually ninety  
3 days.<sup>11</sup> If these sales are not physically endorsed and transferred, and if assignments  
4 don't take place within the ninety (90) days required by the trust agreement and New  
5 York State trust law, they are not "true sales" and assignments into the REMICS are  
6 VOID.<sup>12</sup> Because the originator of a borrower's Deed of Trust no longer has an interest,  
7 having sold the debt to the REMIC, if an assignment is VOID there is no secured  
8 beneficiary. A VOID assignment into a REMIC makes the borrowers' loan like a hot  
9 potato that nobody can claim without getting burned by additional costs like taxation or  
10 litigation.  
11

12 To avoid the cost of compliance with the county-by-county "paper-based" system  
13 Plaintiffs created MERS along with a scheme whereby MERS would appear as  
14 beneficiary and nominee on borrowers' Mortgages and Deeds of Trust. The cost-benefit  
15 to those on the sell-side was achieved by replacing a working democratic system with an  
16 inferior proprietary one which passed the cost-burden of unclear title onto the buy-side  
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25  
26 <sup>11</sup> See 26 U.S.C. §§860D(a)(3)-(4) (2006)(requiring substantially all assets of a REMIC to be qualified mortgages acquired  
27 within ninety days of the REMIC's creation or other permanent investments); *id.* §860G(a)(3) (defining "qualified  
28 mortgage"), or suffer tax penalties, *see id.* §860F(a) (imposing a 100 percent tax penalty on net income from prohibited  
transactions).

<sup>12</sup> N.Y. Estates, Powers & Trusts Law § 7-2.4 (McKinney 2002).

1 and the public.<sup>13</sup> The cost-burden to those on the buy-side are the risks, among others,  
 2 that 1) the securitized assets will be discharged as unsecured in a debtor's bankruptcy, 2)  
 3 the investor will be subject to two levels of taxation when the mortgage is treated as  
 4 property of the transferor rather than of the REMIC, and 3) standing will not be provable  
 5 for purposes of enforcement.  
 6

7 MERS's profitable business model results from minimal overhead and a steady  
 8 stream of income based on a per-transaction fee charged to servicer members (similar to  
 9 a recording fee).<sup>14</sup> MERS gets around the need for employees by allowing (employees  
 10 of) members to become certified "vice-presidents" or "assistant secretaries" of MERS  
 11 after which they execute recorded documents in MERS's name.<sup>15</sup> Employees of the sell-  
 12 side players attest to having executed multiple endorsements and physical transfers of  
 13 documents required for securitization, but without a regulatory framework of oversight  
 14 there is no incentive for accuracy or method for verification.<sup>16</sup> The private MERS system  
 15 is murky and self-regulating at the same time as securitization requires multiple  
 16 transactions that comply with federal and state regulations and it tracks servicing rights,  
 17 but not ownership.  
 18  
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24 <sup>13</sup> AEQUITAS COMPLIANCE SOLUTIONS, FORECLOSURE IN CALIFORNIA: A CRISIS OF COMPLIANCE at 13  
 25 (2012), *available at*: [http://aequitasaudit.com/images/aequitas\\_sf\\_report.pdf](http://aequitasaudit.com/images/aequitas_sf_report.pdf) (noting that MERS records matched with the  
 26 deed of trust beneficiary only 42 percent of the time);

27 <sup>14</sup> Peterson *supra* at p.1361

28 <sup>15</sup> *Id.* at p.1390-1391

<sup>16</sup> *Id.* at p.1390.

1 Plaintiffs' business model serves its stockholder-owners, the loan servicers, but not  
2 the consumer (or the investor) since the multiple transactions required for compliance  
3 with state and federal law regarding securitization are not recorded in the public registry  
4 and not verifiable. REMIC investors receive monthly reports from trustees that detail  
5 delinquency rates and realized losses, but these statistics do not reveal the factors  
6 involved in these losses so that investors never know when their losses were caused by  
7 poor underwriting procedures, property value declines, or delayed or prevented  
8 foreclosure due to inability to prove standing.<sup>17</sup> The trustees that provide these reports  
9 have no incentive to challenge MERS or its corporate owners since trustees hold  
10 contract positions with limited duty to the investors and may also work for one or more  
11 of the corporate owners of Plaintiff MERS.<sup>18</sup>

12 MERS's use of corporate signing officers that are actually employees of MERS  
13 members (potentially also employees of the MERS' corporate owners), challenges the  
14 concept of MERS's agency since it indicates that that these players are acting on behalf  
15 of themselves and that MERS is a sham agency structure where principals deal directly  
16 with other principals. This sham agency structure creates questions of accountability  
17 and conflict of interest when misrepresentation and fraud occur and of authority when  
18

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19 <sup>17</sup> Levitin *supra* at 706.

20 <sup>18</sup> *Id.* at 708

homeowners seek to negotiate with their actual beneficiary as Defendants did for over a year before filing their Quiet Title Action in state court. When borrowers seek to modify their loans and can only get access to their servicer acting as “agent,” Plaintiffs are the watchdog that makes sure the servicer benefits disproportionately from the conflict of interest between the servicer and the beneficiary.<sup>19</sup>

## II. PROCEDURAL HISTORY

Defendants’ Deed of Trust was originated by United Pacific Mortgage (“UNITED PACIFIC”) and recorded (Los Angeles County Recorder doc. # 050342544) on February 15, 2005. (Comp. EX.1.) Defendants made their payments immediately to Countrywide Financial (“COUNTRYWIDE”) and later to Bank of America, N.A. (“BOA”) until Defendants’ mortgage servicing rights (“MSR”) were transferred to Nationstar Mortgage (“NATIONSTAR”) in October, 2013. Despite multiple problems with BOA, Defendants had not missed a mortgage payment pursuant to their Deed of Trust when they filed their Quiet Title action (Case no. PC052281) in Los Angeles Superior Court North Valley District on January 11, 2012. (Comp. EXs. 1 & 5.) The property at issue in Defendants’ underlying Quiet Title cause of action was their residence at 19127 Romar Street, Northridge, California 91324. (Comp. EX.1.)

In their Quiet Title action Defendants sued UNITED PACIFIC, the beneficiary on Defendants’ Deed of Trust, and “all persons or entities unknown, claiming any legal or

<sup>19</sup> Diane E. Thompson, *Foreclosing Modifications; How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 776-782 (2011) *Available at*: <http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1074/86WLR755.pdf>.

1 equitable right, title, estate, lien, or interest in the property described in this Complaint  
2 adverse to Plaintiff's title, or any cloud upon Plaintiff's title thereto" and Defendants  
3 claimed that no party could claim to be a valid current holder of their Deed of Trust.  
4  
5 (Comp. EX. 5.) No ASSIGNMENT of Defendants' Deed of Trust to any other  
6 beneficiary was recorded with the Los Angeles County Recorder on or before January  
7  
8 11, 2012. Along with their Complaint Defendants recorded a Lis Pendens on May 16,  
9 2012. (Id.)

10  
11 Defendants received a judgment of Quiet Title against Defendant UNITED PACIFIC  
12 and "ALL PERSONS OR ENTITIES UNKNOWN, CLAIMING ANY LEGAL OR  
13 EQUITABLE RIGHT, TITLE, ESTATE, LIEN OR INTEREST IN THE PROPERTY  
14 DESCRIBED IN THIS COMPLAINT ADVERSE TO PLAINTIFF'S TITLE OR ANY  
15 CLOUD UPON PLAINTIFF'S TITLE THERETO." (Comp. EXs. 1 & 5.) Pursuant to  
16 the judgment, the recorded Deed of Trust that was the subject of the Complaint (Los  
17 Angeles County Recorder doc. # 050342544) was ordered expunged. (Id.) Defendants  
18 also recorded the state court judgment and order (doc. # 20130621913) on April 25,  
19 2013. (Comp. EX. 4.)

20  
21  
22  
23 Plaintiffs filed the instant case on September 26, 2013. Plaintiffs filed a Lis Pendens  
24 on October 2, 2013. Plaintiffs served Defendants by mail on October 9, 2013 with a  
25 NOTICE OF ACKNOWLEDGMENT OF SUMMONS AND COMPLAINT which  
26 Defendants signed and returned by mail on October 20, 2013 by and through their  
27  
28

1 attorney. Defendant Darla J. Robinson also received the Summons and Complaint by  
2 personal service on October 26, 2013. Defendant Daniel W. Robinson did not receive  
3 the Summons and Complaint by personal service.  
4

### 5 **III. SUMMARY OF THE COMPLAINT**

#### 6 **A. JURISDICTION**

7  
8 Plaintiffs claim original jurisdiction under 28 U.S.C. §1331 based on Violation of  
9 Due Process due to the deprivation of Plaintiff MERS's property without opportunity to  
10 be heard as protected by the Fifth and Fourteenth Amendments to the U.S. Constitution.  
11 (Comp. ¶s 1 & 45.) Plaintiffs claim supplemental jurisdiction to hear Plaintiffs' state  
12 law claims because they arise out of a common nucleus of operative fact. (Comp. ¶1.)  
13 Plaintiffs claim Diversity Jurisdiction based on complete diversity since Defendants  
14 reside in California and Plaintiffs' corporate home is Delaware and their principal place  
15 of business in the Commonwealth of Virginia and because the amount in controversy  
16 exceeds seventy-five thousand dollars (\$75,000). (Comp. ¶3.)  
17  
18  
19

#### 20 **B. STANDING**

21  
22 Plaintiffs MERS asserts standing under California Code of Civil Procedure §762.010  
23 which requires Plaintiffs in a Quiet Title action to give notice and name as defendants all  
24 persons that claim an interest in the property. (Comp. ¶31.) MERS claims an interest in  
25 Defendants' property due to their being named as "Nominee" and "Beneficiary" on  
26 Defendants' Deed of Trust. (Comp. ¶ 9.) MERS's claim also derives from their  
27  
28



1 functions as lien holder of record to 1) receive service of legal process for proceedings  
2 related to the secured property and 2) to notify the beneficiary or “take other appropriate  
3 action to protect the security interest or collateral.” (Comp. ¶25.)  
4

### 5 C. GENERAL ALLEGATIONS

6 Plaintiffs claim that under California Real Property Law, including, but not limited  
7 to, CCP§762.010, a Plaintiff in a Quiet Title action must give notice to, and name as  
8 defendants, all persons who “claim an interest in the property.” (Comp. ¶31.) Plaintiffs  
9 allege that they “claimed an interest” in Defendants’ property at the time that  
10 Defendants’ filed their state court action. (Comp. ¶48.) Plaintiffs allege that their  
11 property interest was “recorded in the public land records” and “gave notice to the  
12 Robinsons – and the world- of MERS’s claimed interest in the Property.” (Comp. ¶48.)  
13  
14

15 Plaintiffs claim that Defendants were aware that MERS was the beneficiary of  
16 record. (Comp. ¶33.) Plaintiffs claim that prior to the time the Robinsons filed their  
17 Complaint the originating lender, United Pacific Mortgage, had transferred ownership of  
18 the Promissory NOTE and that Defendants were aware of this even though there was no  
19 recorded assignment of Defendants’ Deed of Trust to a subsequent beneficiary. (Comp.  
20 ¶32.) Plaintiffs claim that if they had known about the state court action, they would  
21 have defended the action and alerted the loan servicing agent or current note holder that  
22 action needed to be taken to protect the security interest. (Comp. ¶36.)  
23  
24  
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28

1 Plaintiffs allege that because MERS was not served with the Summons and  
 2 Complaint, therefore the state court never acquired jurisdiction over MERS. (Comp.  
 3 ¶38.) Plaintiffs allege that since MERS claimed “a record interest in the property and  
 4 Deed of Trust,” and because MERS was not served with the summons and complaint,  
 5 therefore Defendants’ state court judgment is VOID. (Comp. ¶38.) Despite United  
 6 Pacific Mortgage being the recorded beneficiary of Defendants’ Deed of Trust, and no  
 7 recorded assignment to a subsequent beneficiary, Plaintiffs allege that “originating  
 8 lender United Pacific Mortgage never held the record interest in the Property or Deed of  
 9 Trust as the recorded beneficiary.” (Comp. ¶41.)

13 Plaintiffs seek Cancellation of Instrument for both the Judgment of Quiet Title and  
 14 Expungement of the Deed of Trust (Los Angeles County Recorder doc. # 20130621913)  
 15 and the Lis Pendens (doc. # 20120731667) recorded April 25, 2013. (Comp. ¶s 54-55.)  
 16 Plaintiffs allege that both documents are invalid and VOID because they were not  
 17 properly noticed “as required by law.” (Comp. ¶55.) Plaintiffs allege that Defendants  
 18 acted “with reckless disregard for the plaintiffs’ rights in recording instruments.” (Comp.  
 19 ¶57.)

#### 23 D. DAMAGES

24 Plaintiff MERS claims that they have been damaged because they lost the right to  
 25 protect their “security interest” in the property. (Comp. ¶ 41.) Plaintiffs also claim that  
 26 they are damaged because they lost the right to protect the interest of the note-owner(s)  
 27  
 28

1 with whom MERS had “a contractual obligation to perform certain duties.” (Comp.  
 2 ¶41.) Plaintiffs allege that they have been further damaged because Defendants’  
 3 judgment in their state court action “threatens Plaintiffs’ overall business model” which  
 4 is a service Plaintiffs describe as “holder of the beneficiary or mortgagee (i.e. security)  
 5 interest under a deed of trust or mortgage for the benefit of the current note owner(s)”  
 6 and receiver of “legal notices of foreclosures, tax sales or other proceedings impacting  
 7 the note owner’s equitable interest in the mortgaged property.” (Comp. ¶42.)  
 8

9 Plaintiffs claim they will be harmed if the property is transferred, that they are  
 10 entitled to having the instruments cancelled, and to monetary damages from the  
 11 Robinsons. (Comp. ¶55.) Plaintiffs allege that they are entitled to recover attorney fees  
 12 from the Robinsons for the legal cost incurred by cancelling these instruments. (Comp.  
 13 ¶56.) Plaintiffs request punitive damages and exemplary damages because “the  
 14 Robinsons acted intentionally or with reckless disregard for plaintiffs rights.” (Comp.  
 15 ¶57.)  
 16  
 17  
 18  
 19

#### 20 **IV. ARGUMENTS IN SUPPORT OF MOTION TO DISMISS**

21 Defendants submit this Memorandum of Law in support of their pending motion to  
 22 dismiss on the grounds that pursuant to Fed. R. Civ. P. 17(a), this complaint has not been  
 23 brought by the real party(s) in interest as the real party(s) in interest is the current  
 24 holder(s) of Plaintiffs’ Promissory NOTE, not Defendants MERS, the agent. Dismissal  
 25 of Plaintiffs complaint is also appropriate based on improper venue pursuant to Fed. R.  
 26  
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1 Civ. P. 12(b)(3) since Plaintiffs' Due Process claim rests on their allegation that they are  
2 a party in interest, and their invocation of Diversity Jurisdiction also rests on this  
3 allegation couched as fact. Plaintiffs' complaint should finally be dismissed for lack of  
4 subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) since a due process claim  
5 can only be brought by a party at interest. In the alternative Defendants argue that  
6 dismissal of Plaintiffs' complaint is appropriate pursuant to Fed. R. Civ. P. 12(b)(6)  
7 because Plaintiffs have failed to state a cause of action based on the above.  
8  
9

10 **A. The Complaint should be dismissed because under FRCP 17(a) Plaintiffs are**  
11 **not the real party at interest.**  
12

13 In *Gomes* the court upheld the right of MERS under California's nonjudicial  
14 foreclosure scheme to initiate a foreclosure as the nominee, or agent, of the noteholder  
15 due to the power of sale clause in a Deed of Trust. *Gomes v. Countrywide Home Loans,*  
16 *Inc.*, 192 Cal. App. 4th 1149, 1156 (Cal. App. 4th Dist. 2011.) In *Fontenot* the court  
17 found there was nothing inconsistent in MERS being both the beneficiary and the  
18 Nominee, i.e., agent of the lender, but the court found the legal implication of this to be  
19 that "MERS may exercise the rights and obligations of a beneficiary of the Deed of  
20 Trust, but it will exercise those rights and obligations only as an agent for the lender, not  
21 for its own interests." *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 273  
22 (Cal.App.1st Dist.2011). The *Gomes* court did not address MERS's claim of actual  
23 beneficiary status, but held that MERS's right to initiate foreclosure proceedings came  
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1 from their status as the lender's agent. *Gomes supra* 192 Cal.Ap.4th at 1157-1158; see  
2 also: *Ferguson v. Avelo Mortgage, LLC*, 195 Cal.App.4th 1618, 1625-1627 (Cal.App.2d  
3 Dist.2011).

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5 To demonstrate that he is the real party in interest, a plaintiff must meet the  
6 constitutional minimum of standing that consists of three elements which are: 1) an  
7 “injury in fact” – an invasion of a legally protected interest which is (a) concrete and  
8 particularized, and (b) “actual or imminent” not “conjectural” or “hypothetical;” second  
9 there must be a causal connection between the injury and the conduct complained of –  
10 the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and  
11 not ... the result [of] the independent action of some third party not before the court;”  
12 and third it must be “likely” as opposed to merely “speculative,” that the injury will be  
13 “redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-  
14 561 (U.S. 1992)

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19 Plaintiffs’ revenue comes from fees and MERS has no financial interest in the  
20 Defendants’ Deed of Trust and has suffered no injury in fact. *Gomes supra* 192  
21 Cal.Ap.4th at 1151. Even if non-payment of Defendants’ Deed of Trust were at issue,  
22 nonpayment would not have affected Plaintiffs because they are an agent and not a  
23 principle with no right to collect on Defendants loan. There is no damage to Plaintiffs  
24 that can be redressed by this lawsuit.  
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1 The Ninth Circuit recognized that MERS may not have standing to bring foreclosure  
2 actions as a beneficiary in its own name because MERS does not have an independent  
3 interest in the loan. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 2011  
4 (9th Cir. Ariz. 2011) (“[M]ERS cannot foreclose because it does not have an  
5 independent interest in the loan because it functions solely as a nominee.”  
6 (quoting: *Mortgage Elec. Registration Sys. v. Saunders*, 2 A.3d 289, 294-97, (Me.  
7 2010))). In other circuits there is also a growing split in authority on whether MERS has  
8 standing to bring foreclosure actions in its own name against homeowners. *See: James*  
9 *v. ReconTrust Co.*, 845 F. Supp. 2d 1145, 1155 (D. Or. 2012) (holding that MERS was  
10 not a beneficiary within the meaning of the Oregon Trust Deed Act, Or. Rev. Stat.  
11 §86.705(2) but was solely the agent of the noteholder.); *Mortgage Elec. Registration*  
12 *Sys. V. Saunders*, 2010 ME 79, 2A.3d 289, 295 (ME.2010) (holding that MERS’S only  
13 right is the right to record the mortgage and that it’s designation as “mortgagee of  
14 record” on a document does not change or expand that right and therefore MERS does  
15 not qualify as a mortgagee pursuant to Maine foreclosure statute 14 M.R.S. §§6321-  
16 6325.); *Weingartner v. Chase Home Finance, LLC*, 702 F.Supp.2d 1276, 1280 (D. Nev.  
17 2010) (holding that MERS's identification as a beneficiary on a deed of trust  
18 does not confer beneficiary status.) This assessment is consistent with prior pleadings  
19 where Plaintiff MERS has claimed legal title only as a nominee contractually prohibited  
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1 from exercising any rights without the authorization of the actual beneficiary. *Mortg.*  
 2 *Elec. Registration Sys. v. Neb. Dep't of Banking & Fin.*, 270 Neb. 529, 533 (Neb. 2005).

3 The three (3) purposes of California's comprehensive nonjudicial foreclosure scheme  
 4 are: "(1) to provide the [beneficiary-creditor] with a quick, inexpensive and efficient  
 5 remedy against a defaulting [trustor-debtor]; (2) to protect the [trustor-debtor] from  
 6 wrongful loss of the property; and (3) to ensure that a properly conducted sale is final  
 7 between the parties and conclusive as to a bona fide purchaser." *Gomes*, supra 192  
 8 Cal.Ap.4th at p.1154. Having enjoyed the freedom from any burden of proof as to  
 9 standing that California's "quick, inexpensive and efficient" nonjudicial foreclosure  
 10 scheme provides to beneficiaries and their agents, Plaintiffs now seek to expand that  
 11 freedom to a due process right to initiate an action as a party at interest and beneficiary  
 12 in their own right. *Id.* Plaintiffs assert standing based on being named as "beneficiary"  
 13 as well as "nominee" on Defendants' Deed of Trust despite the case law which has  
 14 determined this to provide them status as agent only. *Fontenot v. Wells Fargo Bank,*  
 15 *N.A.*, 198 Cal. App. 4th 256, 270.

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 22 **B. Plaintiffs are in the improper venue. Fed. R. Civ. P. 12(b)(3).**

23 Venue is premised on "administrative" considerations established by statute that are  
 24 designed to "reflect equity or expediency in resolving disparate interests of parties to a  
 25 lawsuit in the place of trial." *Burlington N. R.R. v. Ford*, 504 U.S. 648, 650-651, 112  
 26 S.Ct. 2184, 2186 (U.S. 1992). Proper venue is based on statutory criteria such as a  
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1 party's residence. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-168,  
 2 60 S.Ct. 153, 154(U.S. 1939). Plaintiffs' choice of venue rests on their assertion that  
 3 they are a party in interest, not an agent with authority granted by a principle. *Id* at 174.  
 4 As detailed herein Plaintiff's claim of beneficiary status is an allegation couched as fact.  
 5 The failure to serve Plaintiffs in the state court action has no bearing on this defect and  
 6 does not make this court the proper venue.  
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9 **C. Plaintiffs do not have Subject Matter Jurisdiction pursuant to Fed. R. Civ.**  
 10 **P.12(b)(1).**  
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12 Federal courts are presumptively without jurisdiction over civil action and the burden  
 13 of establishing the contrary rests upon the party asserting jurisdiction. *Kokkonen v.*  
 14 *Guardian Life Ins. Co. of Am.*, 511U.S. 375, 377, 114 S.Ct. 1673, 1677 (U.S.1994).  
 15 Federal Courts can adjudicate only those cases which the Constitution and Congress  
 16 authorize them to adjudicate: basically those involving diversity of citizenship, or a  
 17 federal question, or to which the U.S. is a party. *Id*. If the court decides that Plaintiffs  
 18 are not a party at interest, they cannot assert diversity jurisdiction or a violation of their  
 19 due process rights pursuant to the Federal Constitution.  
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22 Under Fed. R. Civ.P.17 an action must be prosecuted in the name of the real party in  
 23 interest. "As a general rule a person who is an attorney-in-fact or an agent solely for the  
 24 purpose of bring suit is viewed as a nominal rather than a real party in interest and will  
 25 be required to litigate in the name of his principal rather than in his own name." 6A  
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CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND  
PROCEDURES §1553 (2d ed. 1990). Due to their agency relationship, Plaintiffs can  
only properly bring this action against Defendants as an agent for the actual beneficiary.

**D. Plaintiffs fail to state a claim upon which relief can be granted under Fed. R.  
Civ. P. 12(b)(6).**

The question presented by a motion to dismiss is not whether a plaintiff will prevail  
in the action, but whether the plaintiff is entitled to offer evidence in support of the  
claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) overruled on other grounds by  
*Davis v. Scheuer*, 468 U.S. 183 (1984). While a complaint attacked by a Rule 12(b)(6)  
motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to  
provide the "grounds" of his "entitle[ment] to relief" requires more than labels and  
conclusions.... *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-  
65, 167 L. Ed. 2d 929 (2007). The Court must accept all factual allegations in the  
complaint as true, but the Court is "not bound to accept as true a legal conclusion  
couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (U.S. 2009). Here  
Plaintiffs present a legal conclusion couched as fact that because they are named as  
"beneficiary" on Defendants' Deed of Trust that they are therefore real beneficiary with  
all the accompanying rights as a party in interest, but this is an unwarranted legal  
conclusion, not a fact.

1       *Black's Law Dictionary* defines "mortgagee" as "[o]ne to whom property is  
2 mortgaged; the mortgage creditor, or lender." *Black's Law Dictionary* (9th ed. 2009).  
3 Plaintiffs state no facts to show that they are a creditor or a lender. Plaintiffs did not  
4 fund Defendants' loan nor purchase it from a prior beneficiary. Defendants never made  
5 their mortgage payments to Plaintiffs and Plaintiffs claim no right to collect payments or  
6 to reap the results of a foreclosure sale. If Plaintiffs were to declare bankruptcy, no  
7 creditor could claim Defendants' property because it was an asset of Plaintiff MERS.  
8 Plaintiffs' claim of ownership, and of the rights of a beneficiary with status as a party in  
9 interest, is strictly a fiction.

13       A complaint may fail to show a right to relief either by lacking a cognizable legal  
14 theory or by lacking sufficient facts alleged under a cognizable legal theory. *Balistreri*  
15 *v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. Cal.1990). Here the Plaintiffs'  
16 contention of status as a party at interest is a legal conclusion couched as a factual  
17 allegation and without legal justification.

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## **V. CONCLUSION**

It is understandable that Plaintiffs seek the Court's precedent in this case to leapfrog over existing case law to declare MERS a party in interest. Because the MERS system involves voluntary self-reporting with no formalities and no accountability for inaccuracy it is likely that Plaintiffs cannot claim with surety the principal of Defendants' loan. It is also likely that Defendants' Promissory NOTE was one of the millions that COUNTRYWIDE did not transfer to a REMIC in 2005 when Defendants' loan was originated and that no party has actual possession of Defendants' original promissory Note.<sup>20</sup> If Plaintiff is successful in claiming a new right to sue as a party at interest the troubling conflict-of-interest issues surrounding MERS's status and the unreliability of their computer registry to provide proof of ownership and clear title will disappear and the REMIC trust that is currently collecting on Defendants' loan will never have to show up to prove they have proper title or standing to sue Defendants.

The crack in the system that Defendants' Quiet Title action pushed its way through is Plaintiff MERS' own creation as is the country-wide crisis of clouded title. The residential mortgage market depends on clarity of mortgage title and clouded mortgage title poses a risk to our entire economy. If the seller of a mortgage is not the real party in interest, millions of new home buyers might as well be buying the Brooklyn Bridge.

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<sup>20</sup> "BoFA Mortgage Morass Deepens After Employee Says Notes Not Sent" by Prashant Gopal & Jody Shenn November 29, 2010. Available at: <http://www.bloomberg.com/news/2010-11-30/bofa-mortgage-morass-deepens-after-employee-says-trustee-didn-t-get-notes.html>.

1 Plaintiff MERS claims a violation of due process rights by their complaint so as to  
2 improperly shift the burden of proof of standing away from themselves, so as to enjoy  
3 the same lack of scrutiny they enjoy as foreclosing parties in California. Plaintiff does  
4 this to mount a case against borrowers (Defendants) that have never missed a mortgage  
5 payment and were only seeking a loan modification. By seeking to establish that  
6 Defendants' Deed of Trust gives Plaintiffs the rights of the actual beneficiary for  
7 purposes of initiating a federal court action against Defendants, Plaintiffs seek to exert a  
8 power over these borrowers that is extreme and unjustified. It is Plaintiffs that are  
9 denying the Due Process rights of Defendants.  
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13 Defendants were repeatedly victimized by their servicer BOA when they sought to  
14 have their loan modified by having their payments diverted and their credit rating  
15 lowered. They filed their Quiet Title action in state court while they continued to pay  
16 their mortgage, not because they wanted a free house, but because they wanted some  
17 leverage over BOA to get their loan modified to a fixed interest rate. During that action  
18 and to this day Plaintiffs have continued to make their loan payments, and have never  
19 defaulted.  
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23 Based on a contradictory naming convention in Defendants' Deed of Trust, and a  
24 status which rests purely on a Power of Sale clause applicable only to foreclosure and is  
25 itself questionable, Plaintiffs now seek to claim beneficiary status and sue Defendants  
26 for damages. A repair system needs to be put in place to fix the MERS "situation" going  
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1 forward, but even though it one of those “too big to fail problems,” giving additional  
2 power to Plaintiff is not the solution. Plaintiff MERS is simply not a beneficiary with  
3 standing to sue as a party in interest in this court.  
4

5  
6 Respectfully submitted,  
7

8 Dated: December 5, 2013

ADVOCATE LEGAL

9 By: /s/ Susan M. Murphy.  
10

Susan M. Murphy

11 Attorney for Plaintiffs

12 DANIEL and DARLA ROBINSON  
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